No. SC94554

In the Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

GARY LELAND COLEMAN,

Appellant.

Appeal from Callaway County Circuit Court
Thirteenth Judicial Circuit, Division Three
The Honorable Kevin M.J. Crane, Judge

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Appellant was charged, as a prior and persistent offender, in the Circuit Court of Callaway County with robbery in the second degree. (L.F. 13-14). Appellant was convicted following a bench trial held May 16, 2013. (Tr. 5-95).

Appellant contests the sufficiency of the evidence to support his conviction. Viewed in the light most favorable to the verdict, the evidence at trial showed the following:

On October 6, 2012, Maria Rothove was working as a teller at Bank Star One in New Bloomfield. (Tr. 23-25). Assistant branch manager Sharon Holland was working in her office. (Tr. 26, 30-31, 43-44). That morning, Appellant entered the bank and headed directly for the teller. (Tr. 25-26). When the teller greeted Appellant with, "Good morning," he did not respond but instead leaned clear across the counter towards her, almost in her face, and put his hand over the counter. (Tr. 25-27, 45).

Appellant told the teller, "I need you to do me a favor. Put the money in this bag." (Tr. 28). Appellant spoke in a low, serious tone and handed her a bag. (Tr. 28). Appellant had one of his hands above the counter while his other hand was below the counter. (Tr. 39). The teller could not see his hands at all times, which concerned her. (Tr. 39). The teller was further concerned that if she didn't do what Appellant told her, she could be hurt, so she took

the bag, opened her drawer, and put money in the bag. (Tr. 29, 39-40). The teller complied with Appellant's demand because she felt that if she didn't, "he might come over the counter after me." (Tr. 29-30). After the teller filled the bag with $1,472.00 in currency, she gave the bag back to Appellant. (Tr. 30, 55).

While this was happening, the branch manager got up and approached the teller from behind. (Tr. 31). When she was about two feet away from the teller, Appellant told the branch manager, "Ma'am, stop where you are and don't move any further." (Tr. 31, 45). The branch manager was "scared to death" by Appellant's demeanor, so she stopped. (Tr. 31, 47-48). Appellant ran out of the building after the teller handed him the bag with money, and the teller said, "I've been robbed," whereafter the branch manager pushed the panic button. (Tr. 31-32, 48-49).

Appellant was subsequently arrested in Texas. (Tr. 65-66). Back in Missouri, Appellant was interviewed by Callaway County Sheriff's Deputy Tim Osburn. (Tr. 65-66). After giving Appellant the *Miranda*[1] warnings, Appellant waived his right to remain silent and spoke with Deputy Osburn. (Tr. 67-70, State's Exhibit 11). After being shown still photographs taken

[1] *Miranda v. Arizona*, 383 U.S. 903 (1966).

from video footage of the bank, (State's Exhibit 10), Appellant admitted that he had robbed the bank. (Tr. 68-69, State's Exhibit 11).

Appellant waived jury trial and did not testify or present any evidence. (L.F. 17, Tr. 1-4, 74). After hearing all of the evidence, the court found Appellant guilty of robbery in the second degree. (Tr. 92). At sentencing, Appellant apologized for his "stupidity" and for "all wrong that I've done." (Tr. 97). The court, having previously found Appellant to be a prior and persistent offender, sentenced Appellant to ten years imprisonment. (Tr. 20-22, 99, L.F. 26-27).

The court of appeals, Western District, reversed Appellant's conviction and sentence on September 30, 2014. *State v. Coleman*, 2014 WL 4815414 (Mo. App. W.D. 2014). On the same day, the Western District ordered this cause transferred.

ARGUMENT

The trial court did not err in overruling Appellant's motions for judgment of acquittal for the charge of robbery in the second degree because the evidence was sufficient to prove that Appellant's actions implicitly threatened the immediate use of physical force.

A. Standard of Review.

In reviewing the sufficiency of the evidence in a judge-tried case, an appellate court must determine whether there was sufficient evidence from which the trial court could have found the defendant guilty beyond a reasonable doubt. *State v. Young*, 172 S.W.3d 494, 496 (Mo. App. W.D. 2005). Under Supreme Court Rule 27.01(b), the findings of the court in a bench-tried criminal case shall have the force and effect of the verdict of a jury. *State v. Crawford*, 68 S.W.3d 406, 408 (Mo. banc 2002).

The appellate court must accept as true all evidence tending to prove guilt, together with all reasonable inferences that support the finding, and must ignore all contrary evidence and inferences. *Young*, 172 S.W.3d at 497. The appellate court does not weigh the evidence or decide the credibility of the witnesses, but defers to the trial court. *Id.* Reasonable inferences may be drawn from both direct and circumstantial evidence. *State v. Salmon*, 89 S.W.3d 540, 546 (Mo. App. W.D. 2002), and circumstantial evidence alone can

be sufficient to support a conviction. *State v. Mosely*, 873 S.W.2d 879, 881 (Mo. App. E.D. 1994).

In *Jackson v. Virginia*, 443 U.S. 307 (1979), the United States Supreme Court emphasized the deference given to the trier of fact. The Court stated:

> This inquiry does not require a court to ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Id. at 318-319.

B. Sufficient evidence that Appellant implicitly threatened the immediate use of physical force.

Appellant contests the sufficiency of the evidence to support his conviction for robbery in the second degree. Specifically, Appellant claims that the State failed to prove that in the course of stealing money he threatened the immediate use of physical force. But the evidence presented and the reasonable inferences drawn from that evidence show that Appellant implicitly threatened the immediate use of physical force.

Section 569.030, RSMo. 2000, provides that a person is guilty of the offense of robbery in the second degree when that person "forcibly steals

property." Section 569.010, RSMo. 2000 provides that a person "forcibly steals" when "in the course of stealing" that person "uses or threatens the immediate use of physical force upon a person" either to defeat resistance to the theft or to compel the surrender of the property. The threat of physical harm need not be explicit; it can be implied by words, physical behavior, or both. *Patterson v. State*, 110 S.W.3d 896, 904 (Mo. App. W.D. 2003); *State v. Rounds*, 796 S.W.2d 84, 86 (Mo. App. E.D. 1990); *State v. Duggar*, 710 S.W.2d 921, 922 (Mo. App. S.D. 1986). The force necessary to constitute robbery may be "constructive as well as actual, and may consist [of] the intimidation of the victim, or putting him in fear." *Rounds*, 796 S.W.2d at 86.

Thus, the elements of robbery in the second degree are: (1) the use or threatened immediate use of physical force upon a person; (2) for the purpose of obtaining property against that person's will. Here, there is both a conduct element and a result element: the conduct element is the use or threatened immediate use of physical force, while the result element is obtaining property against the will of another.

Although the statute prescribes a mental state of "purposely" for the result element at § 569.010(1), there is no mental state prescribed in the statute regarding the conduct element. Pursuant to § 562.021.2, RSMo. 2000, "[i]f the definition of an offense prescribes a culpable mental state with regard to a particular element or elements of that offense, the prescribed

culpable mental state shall be required only as to specified element or elements, and a culpable mental state shall not be required as to any other element of the offense." Thus, there is no mental state required for the conduct element (the use or threatened immediate use of physical force) of second-degree robbery. This means that the State was not required to prove beyond a reasonable doubt that the conscious object of Appellant's conduct was to convey a threat. *See* § 562.016.2, RSMo. 2000 ("A person acts purposely or with purpose, with respect to his conduct . . . when it is his conscious object to engage in that conduct."). In other words, it was not required that Appellant had purposely conveyed a threat to the teller or branch manager; only that Appellant knowingly engaged in conduct that threatened the immediate use of physical force.

In the present case, the court heard evidence that Appellant entered the bank, headed directly for the teller, and then leaned clear across the counter towards her, almost in her face. (Tr. 25-27, 45). Appellant told the teller in a low, serious tone to put the money in a bag he gave her. (Tr. 28). The teller testified that during this time, she could not always see what Appellant was doing with his hand. (Tr. 39). The court heard further evidence that when the branch manager approached the teller, Appellant told the branch manager to stop where she was and not to move any further. (Tr. 31, 45). Both the teller and the branch manager testified that they were scared

what would happen if they did not comply with Appellant's demands. (Tr. 29-31, 47-48).

The judge, as the fact finder, had the opportunity to view footage of the robbery (State's Exhibit 10) and to view the Appellant, the teller, and the branch manager and assess the effect that Appellant's actions (including leaning over the counter while making his demands) had on the teller and the branch manager. It was thus reasonable for the finder of fact to believe that Appellant had the single-minded purpose to steal money from the bank, and that he would do physical harm if his demands were ignored, and that neither the bank teller nor the branch manager should not have been required to test Appellant's intent.

Even if Appellant did not purposely convey a threat, it was clearly his purpose to capitalize on the results of a perceived threat. There is no doubt that it was Appellant's conscious object that the teller and branch manager would feel compelled to deliver up the bank's property in response to his demand, and it was reasonable for the finder of fact to infer this. And "[e]ven if the evidence would support two equally valid inferences, only the inference that supports the finding of guilt can be considered" by this Court. *State v. Latall*, 271 S.W.3d 561, 568 (Mo. banc 2008).

Just last month, this Court issued its opinion in *State v. Brooks*, 2014 WL 5857020, a case with very similar facts. In *Brooks*, the defendant entered

a bank wearing bulky clothing, a long-haired wig, a baseball cap, and sunglasses. *Brooks* at 1. He approached the teller and handed her a note that read: "50 & 100's, No Bait Bills, Bottom Drawer." *Id.* When the teller began to walk away from her station to retrieve the money, the defendant slammed his hand down hard on the counter, telling her to "get back here." *Id*. After explaining to the defendant that the money was elsewhere, the teller retrieved the money and placed it on the counter in front of the defendant, who then put the money into a bag and left the bank. *Id.* Like Appellant, Brooks was charged with robbery in the second degree; like Appellant, he was tried by a judge; and like Appellant, he argued that he did not commit robbery in the second degree by using or threatening to immediately use physical force. *Id.*

In affirming Appellant's conviction, this Court held that "the existence of a threat depends on whether a reasonable person would believe his conduct was a threat of the immediate use of physical force, which is an objective test." *Brooks* at 3. This Court continued:

> Banks are regular targets of robberies, and their employees have a heightened awareness of security threats. A demand for money in that context is an implicit threat of the use of force in and of itself. *See United States v. Gilmore*, 282 F.3d 398, 402 (6th Cir.2002) (stating that oral or written demands for money in a bank "carry with them an

implicit threat: if the money is not produced, harm to the teller or other bank employee may result").

Id.

The fact that Appellant chose a bank is telling. Numerous federal cases interpreting the federal bank robbery statute, 18 U.S.C. § 2113, have concluded that the mere demand for money from a teller in a bank meets a higher burden of establishing "conduct reasonably calculated to produce fear." *See U.S. v. Henson*, 945 F.2d 430 (1st Cir. 1991); *U.S. v. Hickson*, 16 F.3d 412 (4th Cir. 1994); *U.S. v. Robinson*, 527 F.2d 1170 (6th Cir. 1975); *U.S. v. Gipson*, 383 F.3d 689 (8th Cir. 2004); *U.S. v. Friedman*, 860 F.2d 1090 (9th Cir. 1988); *U.S. v. Cornillie*, 92 F.3d 1108 (11th Cir. 1996). Several other states also deem such circumstances to constitute an implicit threat. *See, e.g., State v. Collinsworth*, 966 P.2d 905, 908 (Wash. App. 1997) ("No matter how calmly expressed, an unequivocal demand for the immediate surrender of the bank's money, unsupported by even the pretext of any lawful entitlement to the funds, is fraught with the implicit threat to use force."); *State v. Losey*, 2006 WL 3802925 (Iowa App. 2006) ("[Defendant's] demeanor, proximity to the bank teller, his note demanding money, as well as the teller's resulting fear, when considered in total, support an inference of the requisite statutory intent."); *State v. Hernandez*, 134 N.M. 510, 512-513 (N.M. App. 2003) ("Where a defendant points a note at the teller's cash drawer, keeps his other

hand hidden from view, states that the teller should give him everything, and directs the teller not to use the alarm, a reasonable fact finder could conclude that this combination of actions threatened force and caused the teller to hand over the contents of the cash drawer.").

In claiming that his actions in this case were not a sufficient threat, Appellant cites to *State v. Tivis*, 884 S.W.2d 28 (Mo. App. W.D. 1994), *State v. Henderson*, 310 S.W.3d 307 (Mo .App. S.D. 2010), and *State v. Carter*, 967 S.W.2d 308 (Mo. App. E.D. 1998). (App. Br. 12-13). All three of these cases are factually distinguishable. In *Tivis*, the defendant, after a conversation on the street, yanked the purse from the victim without making any demands for the purse. 884 S.W.2d at 29. In *Henderson*, the defendant brushed the store clerk's arm as he was grabbing money from the cash register. 310 S.W.3d at 309.

The factual issue in *Tivis* and *Henderson* was not whether there was a threat of force: rather, it was whether the defendant had used physical force. Logically, before a demand can imply the potential for force, a demand has to be made. A case in which no demand was made is not relevant to the issue of what must be said to imply a threat of force.

In *Carter*, the defendant approached the victim on the street and, after a brief, friendly conversation, demanded her purse. 967 S.W.2d at 308. While *Carter* did involve a demand, the State conceded that there was no evidence

the defendant used or threatened the immediate use of physical force upon the victim and that *Tivis* applied. 967 S.W.2d at 309. As such, without significant analysis of whether the demand implied the possibility of force, the Eastern District found that the evidence was insufficient. *Id*. The present case is factually distinguishable from *Carter*, most notably in the setting of the bank as opposed to a street encounter.

Appellant seeks a cramped and narrow definition of "forcibly steals" as applied to robbery that would make it impossible to convict individuals such as Appellant, who demanded the property of another and avoided the use of actual physical force, did not display a weapon or specifically threaten physical force but rather implicitly threatened immediate use of physical force through other means. Appellant's view would require, among other things, that a victim test the resolve of a defendant who demands property by refusing to co-operate absent an overt threat of force (such as the display of a weapon) or even the actual use of physical force. Moreover, a person contemplating a bank robbery would recognize that he could avoid a robbery conviction if he modulated his voice, did not display or pretend to display a weapon, and merely avoided such terms as "holdup" or "stickup" in his oral or written demands for money.

Respondent respectfully submits that here, the evidence of force or the threat of force was sufficient to meet the requirements of robbery in the

second degree and that the trial court did not err in finding Appellant guilty. A defendant who enters a bank and demands money without issuing an explicit verbal threat and without indicating he was armed may nevertheless imply the threat of immediate physical force by his words and actions. The reasonable inference raised by Appellant's actions was that he threatened the immediate use of physical force and thus forcibly stole money. This point should be denied.[2]

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[2]Appellant seeks reversal of his judgment and sentence. (App. Br. 16-17). Should this Court find that Appellant is entitled to any remedy, this Court should enter a conviction for the class C felony of stealing pursuant to § 570.030, RSMo 2000, and remand to allow the trial court to sentence Appellant on that charge as a prior and persistent offender. *See State v. Ecford*, 239 S.W.3d 125, 130 (Mo. App. E.D. 2007).

CONCLUSION

The trial court did not commit reversible error in this case. Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 3,277 words, excluding the cover and certification, as determined by Microsoft Word 2010 software; and

2. That a true and correct copy of the attached brief, was sent through the eFiling system on this 1st day of December, 2014, to:

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